Supreme Court, U.S.
FILED

No. (1)

95-497 SEP 25 1995

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN M. SILVESTRI,

Petitioner,

vs.

MARK J. CHRISTMAN
and JOAN P. FELDMAN,

Respondents.

Writ Of Certiorari
To The United States Court
Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. SILVESTRI, ESQ.
Petitioner
Pa. I.D. #21479
223 Fourth Avenue, Room 700
Pittsburgh, PA 15222-1713
(412) 391-0958

QUESTIONS PRESENTED FOR REVIEW

I. WAS IT IMPERMISSIBLE TO IMPOSE SANCTIONS UNDER BANKRUPTCY RULE 9011 (WHICH PARALLELS CIVIL RULE 11) UPON AN ATTORNEY FOR FILING AN INVOLUNTARY BANKRUPTCY PROCEEDING IN WHICH HIS CLIENT WAS THE SUCCESSFUL PARTY, BY VIRTUE OF THE INVOLUNTARY DEBTOR IN BANKRUPTCY CONVERTING THE INVOLUNTARY BANKRUPTCY PROCEEDING TO A VOLUNTARY BANKRUPTCY PROCEEDING WITH THE EXPRESS APPROVAL OF THE BANKRUPTCY COURT?

II. ASSUMING ARGUENDO IT WAS PERMISSIBLE TO IMPOSE SANCTIONS UPON A SUCCESSFUL PARTY'S ATTORNEY, FOR SIGNING AND FILING THE PAPER WHICH INITIATED THE SUCCESSFUL PROCEEDING, DID THE BANKRUPTCY COURT EXCEED ITS AUTHORITY IN:

A. IMPOSING ATTORNEY PRACTICE REGULATION SANCTIONS (1) WHICH REGULATE YOUR PETITIONER'S FUTURE MANNER OF PRACTICE IN THE BANKRUPTCY COURT (WITHOUT NOTICE), AND (2) WHICH ATTACH THE COMPLETION OF NON-EXISTENT CONTINUING LEGAL EDUCATION COURSES, TO PROSPECTIVE ATTORNEY-CLIENT RELATIONS; AND

B. IMPOSING SANCTIONS FOR OTHER CONDUCT NOT THE SUBJECT OF ANY MOTION OR NOTICED HEARING, AND UTILIZING 28 U.S.C. §1927 WITHOUT NOTICE THAT THIS LIABILITY THEORY FOR SANCTIONS WAS EITHER BEING PURSUED BY THE SANCTION MOVANTS OR BEING CONSIDERED BY THE COURT?

TABLE OF CONTENTS

Page

Petition For Writ Of Certiorari

Questions Presented For Review . . . 1

Table Of Contents 2

Table Of Authorities 4

Reference To The Unofficial Report Delivered In The Courts Below 6

Concise Statement Of The Grounds On Which The Jurisdiction Of This Court Is Invoked 7

Statutes And Rules Involved In The Case 8

Statement Of The Case 19

Argument 36

I. Sanctions Should Not Be Imposed Against A Prevailing Party's Attorney Under Bankruptcy Rule 9011 36

Page

II. If Sanctions Can Be Imposed Against A Prevailing Party's Attorney Under Bankruptcy Rule 9011:

A. The Sanctions Should Not Include Regulations Affecting The Attorney's Permission To Practice Law In The Bankruptcy Court; And 38

B. Sanctions Cannot Be Imposed Without Due Process 50

Appendix . . . . . 1a - 442a

TABLE OF AUTHORITIES

Page

Cases:

Board of Regents v. Roth,
408 U.S. 564, 577,
33 L.Ed.2d. 548, 561,
92 S.Ct. 2701 (1972) 47

Business Guides v. Chromatic Comm.,
498 U.S. 533, at 553,
112 L.Ed.2d 1140, at 1160,
111 S.Ct. 922 (1991) 37

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384, 110 L Ed. 2d 359,
110 S. Ct. 247 (1990) 41

Frazier v. Heebe, 482 U.S. 641,
96 L. Ed. 2d 557,
107 S.Ct. 2607 (1987) 42

Memphis Light, Gas & Water Div.
v. Craft, 436 U.S. 1, 9-19,
56 L.Ed.2d. 30, 39-45,
98 S.Ct. 1554 (1978) 47, 48

Other Citations:

Bankruptcy Rule 9011 . . 1, 8, 24, 25,
36, 40, 41, 45,
50, 53

Civil Rule 11 . . . . 1, 36, 37, 45, 50

Civil Rule 83 41

Local Bankruptcy Court Rule
9010.1 . . . . . 8, 11, 43

(Table Of Authorities - Continued)

	Page
Local District Court Rule 1(b)	8, 12, 41, 47
Local District Court Rule 1(c)	8, 12, 41, 47
Local District Court Rule 1(e)	8, 12, 41
Local District Court Rule 22(I)	8, 13, 41, 48
Local District Court Rule 22(V)	8, 13, 15, 41, 43, 44, 48
11 U.S.C. §521(1)	53
28 U.S.C §157	8, 10, 19, 42
28 U.S.C. §1334	19
28 U.S.C. §1927	1, 8, 10, 38, 50, 51, 53, 54
28 U.S.C §2071	41
28 U.S.C. §2101(c)	7

REFERENCE TO THE UNOFFICIAL REPORT DELIVERED IN THE COURTS BELOW

The only opinion delivered by a court below was by the United States Bankruptcy Court for the Western District of Pennsylvania, at Bankruptcy No. 88-01186 JKF, and Motion Nos. 88-5359-M and 89-1373-M. This opinion was not published in any official reporter. The slip opinion is reproduced in the Appendix at Pages 10a-44a.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Review is sought of two Judgments entered in the United States Court of Appeals for the Third Circuit dated May 30, 1995 (Appendix, Pages 1a-4a).

Rehearing of these two Third Circuit Judgments was requested, and denied by Orders dated June 27, 1995 (Appendix, Pages 5a-8a).

The statutory provision that confers jurisdiction to review these judgments by writ of certiorari is 28 U.S.C. §2101(c).

STATUTES AND RULES INVOLVED IN THIS CASE

This case involves Bankruptcy Rule 9011(a), 28 U.S.C. §1927, 28 U.S.C §157(a) & (d), Local Bankruptcy Court Rule 9010.1, Local District Court Rule 1(b), (c) & (e), and Local District Court Rule 22(I) & (V), which state:

> Bankruptcy Rule 9011. Signing and Verification of Papers
>
> (a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the

best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

* * * * *

28 U.S.C. §1927. Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

* * * * *

28 U.S.C. § 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

...

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so

withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

* * * * *

Local Bankruptcy Court Rule 9010.1 ADMISSION TO PRACTICE

A. Attorneys who are admitted to the bar of the United States District court for the Western District of Pennsylvania pursuant to District court Rule 1 are admitted to the bar of this court.

B. No one, other than an attorney regularly admitted to practice in this court, shall appear in any proceeding on behalf of any trustee, creditor or other party in interest, except by special leave of a bankruptcy judge.

C. District court Rule 22 of the United States District court for the Western District of Pennsylvania shall apply as to discipline of attorneys, and amendments to said rule promulgated by the said court shall also automatically apply.

* * * * *

Local District Court Rule 1(b), (c) & (e)

RULE 1. ATTORNEYS

...

(b) Eligibility. Any person who is eligible to be admitted to practice before the Supreme Court of Pennsylvania, and who is a resident of the Western District of Pennsylvania is eligible for admission to the Bar of this Court.

(c) Any person who is a member in good standing of the Bar of the Supreme Court of Pennsylvania, or a member in good standing of the Supreme Court of the United States, or a member in good standing of any United States District Court, may be admitted to practice before the Bar of this Court, but subject to the provisions of sub-paragraph (e).

...

(e) Attorneys Who Do Not Maintain An Office In This District. Any attorney who does not maintain an office in this District for the practice

of law shall, in each proceeding in which he appears, have associate counsel residing in and maintaining an office in the district, whose appearance and office address shall also be entered of record, upon whom or at whose office all notices, rules and pleadings may be served in accordance with the Federal Rules of Civil Procedure and with the rules and practice of this Court; and the attendance of any such associate counsel upon any motion, hearing or taking of testimony shall be a sufficient appearance for the party or parties whom he so represents.

* * * * *

Local District Court Rule 22(I) & (V)

Rule 22 - RULES OF DISCIPLINARY ENFORCEMENT

I. INTRODUCTION

A. Responsibility of Court

The United States District Court for the Western District of Pennsylvania, in furtherance of its inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it, or admitted for the purpose of a particular proceeding (pro

hac vice), promulgates the following Rules of Disciplinary Enforcement superseding all of its rules pertaining to disciplinary enforcement heretofore promulgated.

B. Adoption of Code of Professional Responsibility

Acts or omissions by an attorney admitted to practice before this court, individually or in concert with others, which violate the Code of Professional Responsibility adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of Pennsylvania as amended from time to time by the state court, except as otherwise provided by specific rule of this court.

C. Sanctions for Misconduct

For misconduct defined in these rules, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other

disciplinary action as the circumstances may warrant.

D. Admission to Practice as Conferring Disciplinary Jurisdiction

Whenever an attorney applies to be admitted or is admitted to this court for purposes of a particular proceeding (pro hac vice), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

.....

V. DISCIPLINARY PROCEEDING

A. Reference to Counsel

When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this court shall come to the attention of a judge of this court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the Chief Judge shall refer the matter to counsel for investigation and the prosecution of a formal

disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Recommendation of Counsel

Should counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney, the disposition of which in the judgment of the counsel should be awaited before further action by this court is considered or for any other valid reason, counsel shall file with this court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral, or otherwise setting forth the reasons therefor.

C. Order to Show Cause

To initiate formal disciplinary proceedings, counsel shall obtain an order of this court upon a showing of probable cause requiring the respondent-attorney to show cause within thirty (30) days after service of that order upon that attorney, personally

or by mail, why the attorney should not be disciplined.

D. Hearings

Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation, the Chief Judge shall set the matter for prompt hearing before one or more judges of this court, provided, however, that if the disciplinary proceeding is predicated upon the complaint of a judge of this court the hearing shall be conducted before a panel of three other judges of this court appointed by the Chief Judge, or if there are less than three judges eligible to serve or the Chief Judge is the complainant, by the Chief Judge of the Court of Appeals. Where a judge merely refers a matter and is not involved in the proceeding, he shall not be considered a complainant.

The judge or judges to whom a disciplinary proceeding is assigned by the Chief Judge may order and conduct a further hearing, or take testimony, or hear argument, and make a recommendation to the Board of Judges. The Board, after consideration of the

recommendation, shall enter such order, as it shall determine by a majority vote of the active judges in service at the next meeting of the Board, including dismissal of the charges, reprimand, suspension for a period of time, disbarment, or such action as may be proper.

All such proceedings shall be conducted, as the court shall order, by an attorney of the Office of Disciplinary Counsel of the Supreme Court of Pennsylvania, or by one or more members of the bar of this court, subject to the conditions set forth in Section IX.

STATEMENT OF THE CASE

The basis of jurisdiction in the court of first instance, the United States Bankruptcy Court for the Western District of Pennsylvania, is 28 U.S.C. §§157 and 1334.

1. The filing of an involuntary bankruptcy petition.

Your Petitioner was the attorney for the HAKIMS (the "Clients"), who alleged they were creditors of VIRGINIA MANSIONS APARTMENTS, INC. (the "Debtor"). Your Petitioner signed and filed an involuntary bankruptcy petition on behalf of his Clients against the Debtor on April 29, 1988 (Appendix, Pages 86a-89a).

In response to the filing of the involuntary bankruptcy petition, the VIRGINIA MANSIONS CONDOMINIUM ASSOCIATION (the "ASSOCIATION") filed a Motion to

Dismiss the involuntary bankruptcy (Appendix, Pages 89a-99a). This Motion to Dismiss, alleged that the involuntary petition was "filed...to protect the Hakims...and to delay" a state court action; (Appendix, Pages 96a-97, paragraph 16).

There was a hearing on the ASSOCIATION'S Motion to Dismiss the involuntary bankruptcy, and at this hearing, **the involuntary bankruptcy was converted to a voluntary Chapter 7 bankruptcy**. This was on the oral motion of ROBERT O. LAMPL (LAMPL), the owner of the Debtor, **approved by the bankruptcy court**, and **with the consent of the attorneys for the ASSOCIATION**, the party which originally moved to dismiss the involuntary bankruptcy, **with the consent of the bankruptcy Trustee**, MR. BERNSTEIN,

and **with the consent of the attorney for other creditors**, MR. FEDERLINE. The relevant transcript is as follows:

> MR. LAMPL: I am making a suggestion that we could truncate this process quite a bit since I think the trustee has a serious interest in pursuing these indemnifications and so forth. **If I were to follow the court's suggestion that I** become the responsible officer and **step into the shoes of the debtor, convert this to a voluntary case Chapter 7, then I believe Mr. Silvestri's problems about whether he is a proper debtor or not or petitioning creditors would be academic** other than the issue of whether this stuff was filed in good faith by following the sanctions. ... [Appendix, Page 175a, emphasis supplied.]
>
> * * * * *
>
> ...**That would obviate the whole question of whether this was proper or improper and voluntary and whether or not their [the Hakims'] debts were liquidated and disputed and all those ancillary issues**...[Appendix, Page 176a, emphasis supplied.]

* * * * *

THE COURT: ...Mr. Lampl's oral motion -- I take it it was your motion to substitute yourself for Mr. [Gary] Hakim at this point in time.

MR. LAMPL: I am willing to do so.

THE COURT: Mr. Lampl's motion to substitute as the designated representative of the involuntary debtor in lieu of Gary Hakim is granted. [Appendix, Page 191a.]

* * * * *

THE COURT: Then the next question before I get to that that I wish to address is whether or not this case ought to be converted voluntarily to a voluntary Chapter 7. Mr. Bernstein, do you have any reason to see why it should not?

MR. BERNSTEIN: Your Honor, to facilitate all matters I have no objection to it.

THE COURT: Mr. Silvestri?

MR. SILVESTRI: I have no objection.

THE COURT: Your clients are in accord and you have no objection to conversion of a voluntary Chapter 7 case?

MR. SILVESTRI: Yes, Your Honor.

THE COURT: Yes, they are in accord?

MR. SILVESTRI: My clients do not object to converting the case from an involuntary to a voluntary.

THE COURT: All right. Mr. Christman?

MS. FELDMAN: Your Honor, if I may. Subject to our objections in that we would like to pursue our motion to dismiss in terms of damages the association has suffered up until this time. We would have no other objection to this being a voluntary Chapter 7.

THE COURT: All right. All pending motions for sanctions with regard to the good faith filing will survive the conversion of this case to a voluntary Chapter 7.

Mr. Federline, do you have a position you want to state for the record?

> MR. FEDERLINE: I have no objection, Your Honor.
>
> **THE COURT: <u>Then the involuntary debtor's motion to convert this case to a voluntary Chapter 7 is granted.</u>** ... [Appendix, Pages 192a-194a, emphasis supplied.]

2. The motions for sanctions.

LAMPL then filed a Motion For Sanctions And Request For Referral To Justice Department (Appendix, Pages 302a-310a) against Your Petitioner and his Clients under 11 U.S.C. section 303(i) and Bankruptcy Rule 9011. LAMPL requested that sanctions be imposed for the filing of the involuntary bankruptcy to which, he, as the Debtor's chief operating officer, had just acceded by converting the involuntary bankruptcy to a voluntary bankruptcy.

The ASSOCIATION then amended its Motion to Dismiss the involuntary

bankruptcy to claim sanctions against Your Petitioner and his Clients under Bankruptcy Rule 9011 (Appendix, Pages 312a-313a), even though it had just consented to the involuntary bankruptcy going forward as a voluntary bankruptcy.

3. Bankruptcy Court's decision on the motions for sanctions.

After a series of hearings on the Motions for sanctions, **the Bankruptcy Court concluded that the filing of the involuntary bankruptcy petition was in violation of Bankruptcy Rule 9011** (see the December 22, 1992 Bankruptcy Court Opinion, Appendix, Pages 45a-49a). **This was despite the consent of the Debtor, and all parties, to the Debtor proceeding into voluntary bankruptcy.** Immediate monetary sanctions totalling $85,249.85 for the attorney fees and costs of the

ASSOCIATION and LAMPL, throughout the involuntary and voluntary bankruptcy proceedings, were imposed by the Bankruptcy Court Orders dated December 22, 1992 (Appendix, Page 45a) and January 28, 1993 (Appendix, Page 54a). The Bankruptcy Court Order dated December 22, 1992, at paragraphs 7 and 8, also included provision for supplemental sanctions, as follows:

> 7. It is **FURTHER ORDERED** that John M. Silvestri and Elias J. Hakim, Jr., shall pay to the Clerk of the Bankruptcy Court a fine to be determined by the court pursuant to this court's inherent power to sanction the conduct of those appearing before it. To this end it is **ORDERED** that **on or before January 31, 1993,** John M. Silvestri and Elias J. Hakim, Jr., shall file with the Clerk of the Bankruptcy Court affidavits attaching
>
> a. authentic copies of their tax returns for the period January 1, 1989, through December 31, 1991;

b. Income statements, profit and loss statements and balance sheets for the period January 1, 1989, through September 30, 1992;

c. K-1s, W-2s, 1099s and any other evidence of income for the period January 1, 1989, through September 30, 1992;

d. a current accounts receivable aging schedule, if applicable.

8. It is **FURTHER ORDERED** that if the documents referred to in ¶7a, b, c, and d are not **timely** filed, the court shall enter an order setting the amount of the fine to be paid to the Clerk of the Bankruptcy Court without further notice or opportunity to be heard.

Thereafter, there were Bankruptcy Court Orders, dated February 26, 1993 (Appendix, Pages 59a-60a) and April 29, 1993 (Appendix, Pages 65a-66a), scheduling a hearing for supplemental sanctions. No scheduling Order put Your Petitioner on notice that anything other

than the previously referenced monetary sanctions were contemplated by the Bankruptcy Court.

The hearing on the supplemental monetary sanctions, or "fines", for Your Petitioner was conducted on August 6, 1993 (Appendix, Pages 314a-403a). Following this hearing, a November 12, 1993 Bankruptcy Court Order (Appendix, Pages 68a-73a) partially suspended Your Petitioner from practicing law, and required Your Petitioner to, inter alia, take three hours of continuing legal education focusing in the area of involuntary bankruptcy (a non-existent area of continuing legal education programming).

Your Petitioner filed a Motion To Alter Or Amend The Judgment (Appendix, Pages 404a-412a) of the November 12, 1993

Bankruptcy Court Order, attacking the authority of the bankruptcy judge to regulate Your Petitioner's practice of law, and attacking the requirement for continuing legal education courses that do not exist. Thereafter, the Bankruptcy Judge issued the December 13, 1993 Bankruptcy Court Order (Appendix, Pages 74a-78a), which, inter alia, eliminated the partial suspension of Your Petitioner practicing law, but created practice regulations upon Your Petitioner, by directing Your Petitioner:

1. To disclose to potential involuntary bankruptcy clients (either creditors or debtors) that Your Petitioner is required to satisfy three hours of continuing legal education focusing on

involuntary bankruptcy (Appendix, Page 76a, paragraph "i"); and

2. To obtain special court permission to represent prospective involuntary petitioning creditor clients or involuntary debtor clients, for so long as the continuing legal education requirement is unfulfilled, if court approved fees will be requested (Appendix, Page 77a-78a, paragraph "ii").

4. Proceedings in the District Court.

Four timely notices of appeal to the District Court were filed from the four monetary judgments (Appendix, Pages 50a-53a) entered in the Bankruptcy Court. The District Court, sua sponte, consolidated these appeals into one

District Court proceeding at No. 93-cv-144.

A fifth timely notice of appeal to the District Court was filed from the December 13, 1993 Bankruptcy Court Order (Appendix, Page 74a) imposing supplemental sanctions. The District Court then entered an Order dated March 15, 1994 (Appendix, Pages 79a-80a) fixing a briefing schedule, and sua sponte, adding the Bankruptcy Trustee, Joseph Bernstein, as a party respondent, in the caption in the District Court. The Bankruptcy Trustee did not participate in the District Court appeal.

When the briefing on the appeal was submitted to the District Court, Your Petitioner filed an Affidavit (Appendix, Pages 413a-425a) concerning the non-existence of continuing legal education

programs focussing on involuntary bankruptcy. Later, while the appeal remained undecided in the District Court, Your Petitioner filed a Supplemental Affidavit (Appendix, Pages 426a-432a), confirming the continuing non-existence of such educational programs.

On July 25, 1994, the District Court entered two Orders (Appendix, Pages 81a-83a) denying the appeals, without opinion. After Your Petitioner filed a timely Notice of Appeal to the Third Circuit Court of Appeals from the District Court proceeding which decided the supplemental sanctions, Your Petitioner filed a Motion For Stay Pending Appeal (Appendix, Page 433a-440a), limited to the supplemental sanctions entered by the Bankruptcy Court in the nature of attorney practice

regulations. The District Court then entered an Order, dated August 1, 1994, granting the stay pending appeal (Appendix, Page 84a).

With respect to the District Court proceeding which consolidated the four monetary judgments, a Motion for Rehearing was filed, and was denied on August 4, 1994 (Appendix, Page 85a).

5. The proceedings in the Third Circuit Court of Appeals.

The Third Circuit Court of Appeals denied the appeals from the District Court, without opinion, (Appendix, Pages 1a-4a), and denied rehearing (Appendix, Pages 5a-8a). After the appeal concerning the supplemental sanctions in the nature of regulating the practice of law was docketed in the Third Circuit, the Bankruptcy Trustee, Joseph

J. Bernstein, by a letter dated August 4, 1994 (Appendix, Page 441a-442a) advised the Court that the Bankruptcy Estate had no interest in this appeal.

While the appeal concerning the four separate monetary judgments was pending in the Third Circuit, there was also pending in the bankruptcy court, separate and distinct proceedings to have the three judgments in favor of LAMPL, and his attorneys, Ashton and Kelly, marked satisfied. This separate and distinct bankruptcy court proceeding was settled, such that those three judgments were marked satisfied. Thereafter, the appeal of those three judgments in the Third Circuit was discontinued as to those three judgments, but proceeded on as to the judgment in favor of CHRISTMAN and FELDMAN.

Thus, Bankruptcy Trustee, BERNSTEIN, and LAMPL, ASHTON and KELLY are not parties to this Petition.

ARGUMENT

The United States Court of Appeals for the Third Circuit has approved such a departure by a lower court, in procedures for imposing sanctions and law practice restrictions upon a member of its bar, as to call for an exercise of this Court's supervision. The lower court's sanctions proceedings, affirmed by the Third Circuit Court of Appeals, is contrary to the intent of decisions of this Court.

I. WAS IT IMPERMISSIBLE TO IMPOSE SANCTIONS UNDER BANKRUPTCY RULE 9011 (WHICH PARALLELS CIVIL RULE 11) UPON AN ATTORNEY FOR FILING AN INVOLUNTARY BANKRUPTCY PROCEEDING IN WHICH HIS CLIENT WAS THE SUCCESSFUL PARTY, BY VIRTUE OF THE INVOLUNTARY DEBTOR IN BANKRUPTCY CONVERTING THE INVOLUNTARY BANKRUPTCY PROCEEDING TO A VOLUNTARY BANKRUPTCY PROCEEDING WITH THE EXPRESS APPROVAL OF THE BANKRUPTCY COURT?

Your Petitioner knows of no decision on Bankruptcy Rule 9011, or Civil

Rule 11, where sanctions were imposed for a successful litigation of the paper filed. Business Guides v. Chromatic Comm., 498 U.S. 533, at 553, 112 L.Ed.2d 1140, at 1160, 111 S.Ct. 922 (1991) is of particular interest because it says:

> ...Rule 11 sanctions are not tied to the outcome of the litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded.... [112 L.Ed.2d at 1160.]

In this case, the "specific filing", an involuntary bankruptcy petition (Appendix, Page 86a-88a), was "successful". The outcome of the hearing contesting the bankruptcy filing was the consensual conversion of the involuntary bankruptcy to a voluntary Chapter 7 bankruptcy (Appendix, Page 9a).

II. ASSUMING ARGUENDO IT WAS PERMISSIBLE TO IMPOSE SANCTIONS UPON A SUCCESSFUL PARTY'S ATTORNEY, FOR SIGNING AND FILING THE PAPER WHICH INITIATED THE SUCCESSFUL PROCEEDING, DID THE BANKRUPTCY COURT EXCEED ITS AUTHORITY IN:

A. IMPOSING ATTORNEY PRACTICE REGULATION SANCTIONS (1) WHICH REGULATE YOUR PETITIONER'S FUTURE MANNER OF PRACTICE IN THE BANKRUPTCY COURT (WITHOUT NOTICE), AND (2) WHICH ATTACH THE COMPLETION OF NON-EXISTENT CONTINUING LEGAL EDUCATION COURSES, TO PROSPECTIVE ATTORNEY-CLIENT RELATIONS; AND

B. IMPOSING SANCTIONS FOR OTHER CONDUCT NOT THE SUBJECT OF ANY MOTION OR NOTICED HEARING, AND UTILIZING 28 U.S.C. §1927 WITHOUT NOTICE THAT THIS LIABILITY THEORY FOR SANCTIONS WAS EITHER BEING PURSUED BY THE SANCTION MOVANTS OR BEING CONSIDERED BY THE COURT?

A. ATTORNEY PRACTICE REGULATION ISSUES

A hearing on supplemental sanctions, as proposed by the December 22, 1992 Order (Appendix, Pages 314a-403a), occurred on August 6, 1993. The outcome of this hearing was the imposition of

non-monetary sanctions by a November 12, 1993 Order (Appendix, Pages 68a-73a), which were modified by a final December 13, 1993 Order (Appendix, Pages 74a-78a). The December 13, 1993 Order imposed practice regulations upon Your Petitioner, requiring Your Petitioner:

a. To disclose to potential involuntary bankruptcy clients (either creditors or debtors) that Your Petitioner is required to satisfy three hours of continuing legal education focusing on involuntary bankruptcy (Appendix, Page 76a, paragraph "i"); and

b. To obtain special court permission to represent prospective involuntary petitioning creditor clients or involuntary debtor clients, for so long as the continuing legal

education requirement is unfulfilled, if court approved fees will be requested (Appendix, Pages 77a-78a, paragraph "ii").

1. Determining an attorney's fitness to practice, or placing practice restrictions upon any attorney, is outside the authority of a single judge.

The Bankruptcy Judge lacked authority, under Bankruptcy Rule 9011, to pass upon Your Petitioner's fitness to practice before the Western District Court's Bankruptcy Court unit, and further, lacked authority to regulate Your Petitioner's attorney-client affairs in the practice of law. This is because the intent and purpose of Bankruptcy Rule 9011, being the same as the intent and purpose of District Court Rule 11, is to deter future conduct, not regulate the manner of future practice. See the case

of Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 L Ed. 2d 359, 110 S. Ct. 247 (1990), in which it is stated:

> ...It is now clear that **the central purpose of Rule 11 is to deter** baseless filings in the district court... [496 U.S. 393, 110 L E 2d 374, emphasis supplied.]

Nowhere has Your Petitioner found an interpretation of Bankruptcy Rule 9011 that indicated it was to be used by a single judge to pass upon an attorney's fitness or privilege to practice law.

Bar admission and discipline matters are within the purview of local district court rules, which are authorized by 28 U.S.C §2071 and Civil Rule 83. The specific local district court rules here involved are Local District Court Rule 1(b), (c) & (e) (see the text, supra., Pages 7-8), and 22.I & V (see the

text, supra., Pages 8-13). The district court's authority to regulate an attorney's privilege to practice law has been recognized as a legitimate subject of local district court rules. See Frazier v. Heebe, 482 U.S. 641, 96 L. Ed. 2d 557, 107 S.Ct. 2607 (1987), which states:

> We begin our analysis by recognizing that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business.... This authority includes the regulation of admissions to its own bar...[482 U.S. at 645, 96 L Ed. 2d at 565.]

The relationship of a bankruptcy court to a district court is that a bankruptcy court is a unit of the district court, see 28 U.S.C. §157 (see the text, supra., Pages 5-6).

Local Bankruptcy Rule 9010.1.c (see the text, supra., Page 6) requires that Bankruptcy Judges follow the procedures established by the Local District Court Rules in matters involving discipline.

Local District Court Rule 22.V does not permit an individual judge to impose attorney discipline. Rather, Local District Court Rule 22.V requires the following. A judge, having a complaint concerning discipline, is to refer the complaint to the Chief Judge, who then re-refers any matter, warranting investigation, to appointed disciplinary counsel (see Local Rule 22.V.A, the text, supra., at Pages 10-11). After investigation, disciplinary counsel may make a recommendation for disposition (Local Rule 22.V.B, see the text, supra., Page 11), which may result in the

initiation of formal disciplinary proceedings (Local Rule 22.V.C, see the text, supra., Pages 11-12). Any hearing which occurs is to take place before:

> ...one or more **judges**... provided, however, that if the disciplinary proceeding is predicated upon the complaint of a judge...the hearing shall be conducted before a panel of three **other** judges...appointed by the Chief Judge..." (Local District Court Rule 22.V.D, see the text, supra., Page 12; emphasis and extra emphasis supplied.)

This is an issue of first impression. This Court, in exercising its supervisory authority over inferior courts, must decide whether a single bankruptcy judge may exercise authority to impose disciplinary practice restrictions, in substitution for authority reposed in the full district court, through local rules, which spell

out procedures and mechanisms for attorney discipline.

It is submitted that the intention of the drafters of these Local Rules was, among other things, to guard against the capricious response of an individual judge to the behavior of an attorney found to be personally annoying. An individual judge should not usurp attorney discipline policies and procedures set forth in local rules, by fashioning a myriad of personal practice restrictions, and regulations of attorney-client relations, under the guise of Bankruptcy Rule 9011 or Civil Rule 11.

2. The history of notice through sanctions scheduling orders and the hearing, and the practice restrictions imposed.

As set forth above, the December 22, 1992 Order provided for the imposition of the supplemental sanctions in the nature of "fines" (Appendix, Page 48, paragraph 6). A subsequent February 26, 1993 scheduling Order (Appendix, Pages 59a-60a), confirmed that the issue before the Bankruptcy Court in determining supplemental sanctions was monetary in nature.

Your Petitioner was without notice that his fitness to practice law was in question, or that the bankruptcy court contemplated the imposition of regulations or restrictions on prospective attorney-client relations, or restraints, on Your Petitioner's permission to practice law. This is

borne out in the history of pre-hearing Orders, aforementioned, and the August 6, 1993 hearing transcript (Appendix, Pages 314a-403a).

The permission or license to practice law granted to Your Petitioner by the district court, is a property interest under Pennsylvania state law, which is incorporated into the Local Rules of the district court. See Local District Court Rule 1 (b) and (c), for the source of this property interest, and Board of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d. 548, 561, 92 S.Ct. 2701 (1972), for the proposition that such a property interest is cognizable.

Requisite notice and an opportunity to be heard attaches to any proceeding affecting such an interest in property; see Memphis Light, Gas & Water Div. v.

Craft, 436 U.S. 1, 9-19, 56 L.Ed.2d. 30, 39-45, 98 S.Ct. 1554 (1978). Local District Court Rule 22.I.B and 22.I.C, provide the standards for discipline, and 22.V provides appropriate procedures for due process. Here, there was no due process afforded in the Bankruptcy Judge's sua sponte proceeding, which placed regulations upon Your Petitioner's permission to practice law in the bankruptcy court.

3. Sanctions must not involve the imposition of conditions or requirements impossible to fulfill.

The availability of bankruptcy courses, focusing upon the very narrow practice area of involuntary bankruptcy, is non-existent. See the Affidavit (Appendix, Pages 413a-425a), which documents the investigation into the availability of continuing legal

education programs in the area of involuntary bankruptcies, and which shows that less than one-half hour of programming for the area of involuntary bankruptcies through ten bankruptcy programs offered by five professional organizations over a six month time period. A Supplemental Affidavit (Appendix, Pages 426a-432a) updated this investigation to report three additional programs in the area of bankruptcy which did not include any portion on the topic of involuntary bankruptcies and a fourth program which included one hour on the topic of involuntary bankruptcies, but this fourth program was a program initiated at the suggestion of the Bankruptcy Judge in this case who imposed the sanctions on Your Petitioner (Appendix, Pages 428a-431a, paragraph 4).

B. THE LACK OF DUE PROCESS IN FINDING LIABILITY FOR SANCTIONS

The ASSOCIATION Motion For Sanctions and the LAMPL Motion For Sanctions claimed sanctions only for the improper filing of the involuntary petition under Bankruptcy Rule 9011 (a rule parallel to Civil Rule 11). However, the December 22, 1992 Bankruptcy Court Opinion recited that sanctions were imposed for alleged conduct, other than for the filing of the involuntary bankruptcy, and under 28 U.S.C. §1927.

At no time was there notice that other conduct would be the basis for imposing sanctions, or that liability for sanctions was being considered under 28 U.S.C. §1927. It was with the filing of the December 22, 1992 Bankruptcy Court Opinion, that Your Petitioner was first made aware that conduct, other than the

signing and filing of the involuntary bankruptcy petition, was being sanctioned, or that liability under 28 U.S.C. §1927 was a basis for imposing sanctions.

An analysis of the December 22, 1992 Bankruptcy Court Opinion reveals that sanctions were imposed, sua sponte, for a variety of papers filed, having nothing to do with the filing of the involuntary petition. Sanctions were imposed for the filing of a motion for the bankruptcy judge to recuse herself (Appendix, Page 23); there was no claim that this was an improper motion before the December 22, 1992 sanctions Order issued. Sanctions were imposed for the filing of a motion for contempt and sanctions against MR. LAMPL (Appendix, Page 23); there was no claim that this was an

improper motion before the December 22, 1992 sanctions Order issued. Sanctions were imposed for filing a motion to disallow the claims of certain taxing body creditors (Appendix, Pages 23, footnote 5); there was no claim that this was an improper motion before the December 22, 1992 sanctions Order issued, and, in fact, the sanctioned attorney's Client prevailed in getting a number of the claims disallowed.

Also, an inference can be drawn from the December 22, 1992 Bankruptcy Court Opinion that sanctions were also imposed for arguments.

There were arguments as to whether there were "assets" of the Debtor (Appendix, Pages 29a-31a), as distinguished from "property of the estate", which latter term is defined in

the Bankruptcy Code. It was argued that the term "assets", not defined by the Bankruptcy Code, has a common meaning associated with tangible value.

Additionally, it is inferred from the December 22, 1992 Bankruptcy Court Opinion that sanctions were imposed for arguments made on the issue of whether the Debtor was a guarantor of a mortgage note, because the bankruptcy schedules did not report a guaranty (Appendix, Pages 32a-34a). It is to be noted that it is the duty of a debtor, not creditors, to file schedules under 11 U.S.C. §521(1), which states:

> The debtor shall- (1) file... a schedule of assets and liabilities..."

Arguments are not governed by Bankruptcy Rule 9011 or 28 U.S.C. §1927. Making argument of legal theory, even if

done in the alternative, cannot and should not be a sanctionable event. The Bankruptcy Judge improperly sanctioned Your Petitioner for making argument.

There was never any notice that any of these matters were the subject of sanctionable conduct, or that sanctions were contemplated under 28 U.S.C. §1927.

WHEREFORE, it is requested that a Writ of Certiorari be granted.

Respectfully submitted,

JOHN M. SILVESTRI
223 Fourth Avenue, Room 700
Pittsburgh, PA 15222-1713
(412) 391-0958